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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 1310

MILTON MILLER, Individually and as Trustee, Defendant, Cross-Complainant, Appellant, Court below, *Petitioner*,

v.

CITY OF BAKERSFIELD, Plaintiff, Cross-Defendant, Respondent, Court below, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRIEF FOR RESPONDENT IN OPPOSITION

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INDEX

	Page
Statement of the Case	1
Question Presented	7
No Substantial Federal Question Is Involved	7
(a) Building Standards Valid Exercise of Police Power	7
(b) State Law Authorized Action by City	8
(c) Adequate Due Process Afforded Petitioner	8
(d) Conditions Imposed Reasonable and Non-Discriminatory	10
Conclusion	11

Table of Authorities

City of Bakersfield v. *Miller,* 48 Cal. Rptr. 889, 410 P. 2d 393 (1966)	6
Erie Railroad Company v. *Tompkins,* 304 U.S. 64	8
Fisher v. *Pace,* 336 U.S. 155	8
Kersh Lake Drainage District v. *Johnson,* 309 U.S. 485	8
Queenside Hills Realty Co. Inc. v. *Saxl,* 328 U.S. 80	7

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STATEMENT OF THE CASE

In 1952 after many buildings in the city suffered severe damage due to an earthquake, the City of Bakersfield as an exercise of its police power adopted by ordinance minimum standards for buildings. Since that time the City has endeavored to require so-called Class H occupancies, i.e. hotel and apartment dwellings over two stories in height to comply with the established minimum standards. The standards so far as fire hazardous conditions are concerned

are in fact the standards prescribed in the Uniform Building Code.[1]

On May 11, 1959, the City Council of Bakersfield duly enacted Ordinance No. 1242, New Series which adopted the 1958 edition of the Uniform Building Code, with certain exceptions, as the Building Code of the City of Bakersfield. The minimum standards of the building code applicable in this case however remained as they were since 1952.

Section 203(a) of the Building Code of the City of Bakersfield provides:

> "Sec. 203(a) General. All buildings or structures which are structurally unsafe or not provided with adequate egress, or which constitute a fire hazard, or are otherwise dangerous to human life, or which in relation to existing use constitute a hazard to safety or health, or public welfare, by reason of inadequate maintenance, dilapidation, obsolescence, or abandonment, as specified in this Code or any other effective ordinance, are, for the purpose of this Section, unsafe buildings. All such unsafe buildings are hereby declared to be public nuisances and shall be abated by repair, rehabilitation, demolition, or removal in accordance with the procedure specified in Subsections (b), (c), (d), and (e) of this Section."

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[1] The Uniform Building Code published by the International Conference of Building Officials is a set of building regulations covering fire resistance, safety and structural provisions for buildings. (R.T. 242-250). The Uniform Building Code has been adopted, in whole or substantial part, by some 273 cities and counties in California and has been adopted by the California Legislature, the State Building Standards Commission and the Division of Housing of the Department of Industrial Safety as a minimum standard for building construction. See Cal. Codes, Health & Safety Code § 17922; Administrative Code, title 24. The U.B.C. is republished in its entirety every three years.

The remaining portions of Section 203 provide for notice to an owner, the posting of signs, the right to demolish, and costs. (Petition 44a-45a)

Section 1309 of the ordinance prescribes the minimum safety requirements applicable to existing noncomforming Group H Occupancies more than two stories in height. (Petition 47a-49a)[2]

In April 1952 notice of lack of conformity with the minimum fire safety requirements of the City of Bakersfield was served on the owners of thirteen Class H occupancies in the city. Such notice was served on the operators of the Hotel Padre at that time. (Pl. Ex. 20). Petitioner having assumed active management and control of the Padre Hotel in 1955 was personally served with a notice of the violations at the hotel by letter dated November 25, 1955 (Pl. Ex. 21, Reporter's Transcript, hereafter R. T. 363).

Numerous conferences between Petitioner and various city officials were held. At each conference the city officials attempted to persuade Mr. Miller to voluntarily comply with the ordinance. Petitioner repeatedly claimed that he was financially unable to accomplish the required repairs and modifications.

With the passage of time the City became increasingly impatient with Petitioner's indifference and less responsive to his chronic pleas of financial hardship.

On August 26, 1960, the Chief Building Inspector of the City of Bakersfield as provided by Section 203(b) of the code caused a written notice to be served on Petitioner which contained a detailed listing of unsafe conditions

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[2] It is to be noted that Petitioner failed to include at page 48a of his Petition the important last paragraph of § 1309(f) which reads "Enclosures shall not be required if an automatic fire extinguishing system is provided for all portions of the building except bedrooms, apartments, and rooms accessory thereto."

existing at the Padre Hotel in violation of Section 1309 of Building Code of the City of Bakersfield. (Clerk's Transcript, hereafter C.T. 8, 9) The City demanded that Mr. Miller take corrective action within 48 hours. The notice was ignored. A meeting with Petitioner was held in February 1961. (R.T. 374, 376) At this session Petitioner refused to commit himself to any course of action, not even to the commencement of compliance with the ordinance.

Shortly thereafter, the City Council passed a resolution requesting him to install a sprinkler system in the basement and on the first floor of the hotel within six months and to modify successive floors of the buildings at regular intervals. The entire building was to conform to the code within 12 years. (R.T. 9, 393) Petitioner's only response to this resolution was to erect what he described as an "Alamo-Tombstone sign" on the building in defiance of the Council of the City of Bakersfield and its laws. (R.T. 394)

On September 1, 1961, the present action was filed and the City posted notices on the building warning that it was unsafe for occupancy as provided by Section 203(c) of the City of Bakersfield Code. The complaint alleges that the notice of August 26, 1960 was personally served on Petitioner Miller which notice contained a list of unsafe conditions existing at the Padre Hotel in violation of Appendix Chapter 13 of the Uniform Building Code, 1958 edition, (C.T. 27); and that the Padre Hotel constitutes a fire hazard and a public nuisance as defined by City Ordinance No. 1242, New Series.

Petitioner did not deny that the building code ordinance has been violated and undisputed evidence at the trial demonstrates that the Padre Hotel violates several provisions of the code, e.g., the interior stairways are unenclosed and leave an open shaft in the building from the

second floor to the roof; the elevator shafts are improperly enclosed; other shafts and ducts contain combustible materials and cannot be closed off by dampers; the boiler room is not separated from the remainder of the building by fire resistant materials; exit signs are not of the required size and are inadequately illuminated; fire escapes are improperly constructed, except one improved in 1960; and sleeping rooms of the hotel are connected with the hallways by doors and overhead transoms which necessitate keeping the transoms open because the hallways are used as a return duct for the hotel's air-cooling system.

Even though there was evidence that the hotel is constructed of noncumbustible materials and therefore might be deemed a fireproof building, expert testimony indicated that it could reasonably be considered unsafe for occupancy as a hotel because of the danger of spreading smoke.

The trial court concluded that the hotel constitutes a fire hazard within the meaning of the uniform code adopted by the City and that under the terms of section 203(a) of the code it is a public nuisance. (C.T. 145-154)

The Supreme Court of California in a comprehensive opinion (Petition 33a-43a) unanimously affirmed the trial court and held:

(1) The City of Bakersfield has the power to define by statute the standards by which courts are to judge whether a nuisance exists.

(2) Petitioner's contention that state housing requirements have preempted this field of regulation is without merit.

(3) Section 203(a) of the City Building Code is not unreasonable and the finding of the trial court that the Hotel Padre constitutes a fire hazard is amply supported by the evidence.

(4) The City was not seeking to impose punitive sanc-

tions for methods utilized in the construction of the Hotel Padre in 1929, but was rather eliminating a presently existing danger to the public.

(5) The expenses necessary to comply with the statute and the sanctions imposed for noncompliance are reasonable in relation to the public health or safety being protected.

(6) The repair requirements were not inordinately costly and the statutory mandate is not unconstitutionally onerous.

(7) The height and occupancy classification was in effect prior to the time Petitioner purchased a majority interest in the hotel and is based on substantial fact and therefore the assertion that the code was enacted for the purpose of discriminating against him is unconvincing and no unequal protection of the laws appears.

(8) The evidence also failed to show that city officials discriminated against Petitioner in enforcing the ordinance. The relevant code provisions apply to 13 buildings within the City of Bakersfield. The owners of two of the buildings have voluntarily vacated upper floors of the structures at the request of the city. The other 10 buildings have been remodeled so as to substantially comply with the code or else were in the process of effecting such modifications at the time of the trial. (*City of Bakersfield* v. *Miller*, 48 Cal. Rptr. 889, 410 P. 2d 393 (1966))

As stated by the California Supreme Court, "Defendant (Petitioner) was first notified of code violations in 1955, it would seem that a decade offers enough opportunity to correct the violations at a moderate pace." (Petition 42a)

The Court concluded:

> "It is undisputed that conditions within the Hotel Padre violate provisions of the Uniform Building Code which has been adopted by the City of Bakersfield. The substantive provisions of the code deprive defendant of no right protected by the Constitution, and it is

clearly within the statutory powers of the city to declare that buildings violating the ordinance in ways which directly affect the health and safety of the public are public nuisances. Therefore, the trial court did not err in ordering that the nuisance be abated." (Ibid)

QUESTION PRESENTED

Is a hotel property owner who admits that his property is in violation of the building code regulations of the City of Bakersfield which the Courts of California have held to have been lawfully adopted, applied and enforced, and who since at least 1955 when he was personally served with notice as to the violations, participated in conferences with city officials and court action, and who has openly defied the laws of the City adopted to protect the public health, safety and welfare, deprived of his property without due process?

NO SUBSTANTIAL FEDERAL QUESTION IS INVOLVED

(a) *Building Standards Valid Exercise of Police Power*

Petitioner is herein challenging the power of a municipality to determine as a valid exercise of its police power that the Hotel Padre, constructed in 1929, fails to conform to standards of safety incorporated in the municipal building code enacted since the construction of the building and is therefore a public nuisance.

This Court in *Queenside Hills Realty Co., Inc.* v. *Saxl*, 328 U.S. 80, 82, 83 in a similar case involving a lodging house, stated:

> "Little need be said on the due process question. We are not concerned with the wisdom of this legislation but the need for it. Protection of the safety of persons is one of the traditional uses of the police power of the States. Experts may differ as to the

most appropriate way of dealing with fire hazards in lodging houses. . . . But the legislature may choose not to take the chance that human life will be lost in lodging house fires and adopt the most conservative course which science and engineering offer. It is for the legislature to decide what regulations are needed to reduce fire hazards to the minimum. . . . But in no case does the owner of property acquire immunity against exercise of the police power because he constructed it in full compliance with the existing laws."

(b) *State Law Authorized Action by City*

The Supreme Court of California, interpreting state law concluded that the City acted within its charter and statutory powers in enacting and enforcing the building code ordinance. The California Supreme Court's decision interpreting California statutes and the City Charter is binding upon this Court and will not be reviewed or reversed. *Kersh Lake Drainage District* v. *Johnson,* 309 U.S. 485, 489; *Fisher* v. *Pace,* 336 U.S. 155, 162; *Erie Railroad Company* v. *Tompkins,* 304 U.S. 64, 78, 79. Petitioner's confusion as to state preemption as opposed to power of the City is thus answered and affords no basis for review by this Court.

(c) *Adequate Due Process Afforded Petitioner*

The only question is whether some constitutional right of Petitioner has been violated by the application to Petitioner of the ordinance as thus interpreted under the facts as found by the California Courts. The California Supreme Court concludes, as is abundantly clear from the record, that the Petitioner was deprived of no constitutionally protected right.

The complaint filed by the City alleges that the Padre Hotel constitutes a fire hazard and a public nuisance as defined by City ordinance. (C. T. 24-29)

Petitioner does not deny that the building code ordinance has been violated. Indeed he admitted to substantial non-compliance with the ordinance (C. T. 109). Contrary to Petitioner's statement (Petition 7), his Answer (C. T. 44-49) did not allege that the City made demands for alterations that exceeded the requirements of the building code.

Undisputed evidence at the trial demonstrates that the Padre Hotel violates several provisions of the code in the particulars set forth *supra*, p. 4, 5. For more than one decade Petitioner has jeopardized the lives of his tenants. Since 1955, the City attempted to persuade Petitioner to voluntarily comply with the building code provisions. The pleadings as well as the transcript clearly indicate that numerous hearings were held and at all times the position and acknowledgment of all parties was that the ordinances had, in fact, been violated by the Petitioner. At no time did Petitioner deny the existence of the violations but rather pleaded financial hardships. He later posted a sign described as an "Alamo Tombstone Sign" in defiance of the Council of the City of Bakersfield and its laws.

A written notice containing the list of unsafe conditions existing at the Padre Hotel was personally served on Petitioner on November 25, 1955 and on August 26, 1960. Petitioner by himself or through counsel has participated in the proceedings since 1955 including proceedings in the Superior Court of the State of California in and for the County of Kern, in the District Court of Appeal, Fifth Appellate District and the Supreme Court of the State of California.

Contrary to the assertions now made (Petition 7, 10, 18) the City did not make demands in excess of the code requirements nor did Petitioner ever offer to perform in any manner agreeable to the code that was refused by the City. As stated by the California Supreme Court "Except for this sole improvement [of a fire escape in 1959] defendant

has totally failed to remedy the building code violations existing in the hotel." (Petition 34a)

(d) *Conditions Imposed Reasonable and Non Discriminatory*

The ordinance here involved provides minimum standards for hotels and apartment houses containing more than two stories. Expert witnesses testified that the height of buildings is a factor accelerating the danger to occupants who might be trapped during a fire and that hotels are particularly vulnerable to fires. Moreover, as stated by the California Supreme Court, this height classification was in effect prior to the time Petitioner purchased a majority interest in the hotel. Therefore, in the words of the California Supreme Court, his assertion that the code was enacted by the city for the purpose of discriminating against him is unconvincing. Unequal protection of the laws does not appear. (Petition 42a)

The Supreme Court of California also found that the evidence fails to support Petitioner's claim that the city officials discriminated against him in enforcing the ordinance. The relevant code provisions apply to 13 buildings within the City of Bakersfield. The owners of two of the buildings have voluntarily vacated upper floors of the structures at the request of the City. The other 10 buildings have been remodeled so as to substantially comply with the code or else were in the process of effecting such modifications at the time of the trial. As stated by the California Supreme Court, "Defendant (Petitioner) was first notified of code violations in 1955, it would seem that a decade offers enough opportunity to correct the violations at a moderate pace."

Moreover Section 203(a) of the Code as stated by the Supreme Court of California ". . . does not as defendant implies, declare that buildings which violate the Code only in some minor or technical respect are nuisances; it pro-

scribes as nuisances only those buildings which would seriously endanger public health or safety. The provisions of this section are not unreasonable and the finding of the trial court that the building constitutes a fire hazard within the meaning of this section is amply supported by the evidence." (Petition 39a)

The Supreme Court of California considering whether the expenses necessarily incurred in complying with the statute and the sanctions imposed for noncompliance are reasonable in relation to the public health or safety interest being protected concluded that compliance with the ordinance would in all probability result in increased value of the hotel rather than diminution or destruction and therefore the statutory mandate was not unconstitutionally onerous. (Petition 41a)

CONCLUSION

It is respectfully urged that the Petitioner is without standing to maintain his complaint, and that his petition raises no substantial question which would entitle him to invoke the jurisdiction of this Court.

Respondents respectfully request that the petition for a writ of certiorari to review the judgment of the Supreme Court of the State of California be denied.

Respectfully submitted,

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